

The State of South Carolina



Office of the Attorney General

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March 19, 1987

Honorable Roland S. Corning
Member, House of Representatives
Post Office Box 2805
Columbia, South Carolina 29202

Re: Opinion No. 2681
H. 2601 and H. 2623
Death Penalty Amendments

Dear Representative Corning:

You have requested the Attorney General to issue an opinion related to H.2601 and H.2623 concerning the application and procedures for death penalty sentencing in South Carolina. In particular, you have requested a survey of the thirty states that give the life or death decision to the jury and whether any state requires less than a unanimous verdict. I have reviewed each of these statutes as set out in Spaziano v. Florida, 104 S.Ct. 3154, 3164 n. 9 (1984), and have determined that none of the thirty states allowed for less than a unanimous verdict to recommend the death penalty. As I earlier advised you, seven states treat the sentencing decision differently than the above thirty states. The Florida statute with the jury override provision is the only such provision specifically presented to the court and held constitutional. See: Spaziano v. Florida, supra.

In your second question, you have asked whether Article V, Section 22, of the South Carolina Constitution that states "... All jurors in any trial court must agree to a verdict in order to render the same ..." applies only to the trial phase or to the trial and sentencing phase of a capital

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murder trial. A "verdict" is the answer of the jury concerning any matter of fact, in any cause committed to the jury for trial, its object is to announce to the court the judgment of the jury as to how far the facts established by the evidence conform to those which are alleged and put in issue by the pleadings. 89 C.J.S. Trials § 485(a). Article V, Section 22, applies to any matter committed to the jury for its verdict in any civil or criminal case. This includes sentencing in a capital case in which the jury must make its decision.

In your third inquiry, you request our office's opinion on whether H.2601 and H.2623 are constitutional. H.2601 provides in a joint resolution for a constitutional amendment so as to provide that ten or more members of a jury must vote in favor imposing the death penalty in order for the death penalty to be imposed. In Apodaca v. Oregon, 406 U.S. 404 (1972), a plurality of the United States Supreme Court ruled that the Sixth Amendment does not require jury unanimity in a case where the defendants had been convicted of felonies by 11-1 and 10-2 votes. In particular to the exercise of common sense judgment, the plurality concluded:

In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the state who prosecute and judge him is equally well served.

Therefore, it would appear that the state constitutional amendment proposed passes constitutional muster under the Sixth Amendment, especially in light of Spaziano v. Florida, supra, which held that the right to a jury trial does not include the matter of sentencing.

H.2623 amends the state death penalty act and provides for a majority of the jury to recommend to the trial judge an advisory sentence of life or death based upon various findings. Under present law, it would appear that Article V, § 22, of the South Carolina Constitution would require a

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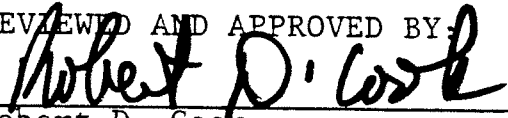
unanimous verdict so as to make this provision unconstitutional without the necessary constitutional amendment. The decision of the jury is a "verdict" because the jury must address the existence of aggravating circumstances as well as the weighing considerations in favor of the life or death decision. Article V, § 22, therefore would apply to this situation. Assuming that your constitutional amendment to Article V, § 22, proposed in H.2601 becomes law, H.2623 requires an amendment to define "majority" as ten or more to impose the death penalty. You may wish to review the Alabama statute that requires a similar decision. Ala. Code § 13-A-5-46 (1982).

Sincerely,


Donald J. Zelenka
Chief Deputy Attorney General

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REVIEWED AND APPROVED BY:


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